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Nos. 99-224 and 99-582

IN THE
Supreme Court of the United States

CHARLES B. MILLER, *et al.*,
Petitioners,

v.

RICHARD A. FRENCH, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE PLAINTIFF CLASS OF PRISONERS IN *TAYLOR v. STATE OF ARIZONA* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The *amicus curiae* respectfully submit this brief in support of the respondents and urge affirmance of the Seventh Circuit's opinion.[1] The *amici* are inmates in the Arizona State Prison System and members of the certified class of plaintiffs in *Taylor v. State of Arizona*, CIV 72-21 and 72-58 PHX RCB (D. Ariz.). They have been litigating issues under the PLRA over the past four years

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus curiae states* that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this amicus brief and their letters of consent have been filed with the Clerk of this Court.

and their rights may be substantially affected by the Court's decision in this matter. They also have experienced, firsthand, the considerable difficulties imposed by the PLRA's automatic stay provision.

SUMMARY OF ARGUMENT

We deal with an act of Congress which, by design, directs a federal court to suspend its own existing judgment. The issue is whether such a direction violates separation of powers or due proces.

The subject, particularly the reasoning of the opinions below and the applicability of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), is well covered by others. We, therefore, limit our discussion to three points: (1) the history underlying the separation of powers principles at issue; (2) whether the PLRA, in effect, imposes a "new reopening requirement" on final judgments in violation of *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995); and (3) the devastating practical burden the automatic stay provision imposes upon prisoners in defending their existing judgment rights.

The following summarizes our arguments on these points:

1. The PLRA's automatic stay provision is a blunt example of the type of legislative interference with final judgments that led the Framers to separate the legislative from the judicial power via Article III of the Constitution.

2. The automatic stay provision violates the separation of powers principles set forth in *Plaut*. In *Plaut*, this Court held that, once a judgment becomes final, Congress may not subject it to new reopening requirements that did not exist when the judgment was pronounced. 514 U.S. at 234. The issue, therefore, is whether a consent decree imposing prospective relief (the main target of the PLRA) is a "final" judgment. This Court has already answered that question, holding, in a prison conditions case, that "a consent decree is a final judgment that may be reopened only to the extent equity requires." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992).

3. Courts indeed may suspend, stay, modify or terminate judgments imposing prospective relief if they conclude that continued operation of the judgment would be inequitable. Thus, for example, a court may suspend, stay, modify or terminate relief if a change in law has occurred that would make it inequitable to continue enforcing the judgment prospectively—*e.g.*, if a change in law has occurred that eliminates the original legal basis or need for the prospective relief. *See, e.g., Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429-30 (1855). But, as a matter of separation of powers, the decision of whether continued enforcement would work inequity is for the courts, not Congress, to make. The automatic stay provision is not a change in law that would make it inequitable to continue enforcing the decree. It is, instead, a legislative mandate to reopen and suspend final judgments of Article III courts.

4. The automatic stay provision imposes such hardships on inmates that, as a practical matter, their judgment rights will be forfeited. This, in turn, both implicates Due Process considerations and the power of Article III courts to issue "final" judgments.

ARGUMENT

I. THE AUTOMATIC STAY PROVISION VIOLATES SEPARATION OF POWERS

A. The History Defining the Separation of Powers Doctrine

The separation of powers principles invoked by the Seventh Circuit and relied upon by respondents are largely embodied in three cases: *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), *Klein* (1871) and *Plaut* (1995). But these cases are merely applications, and not an exhaustive codification, of the separation of powers philosophy and principles they rest upon.

All three cases—cases spanning our Nation's entire constitutional history—directly or indirectly recognize limits on the power of Congress to affect final judgments of Article III courts. The source of their holdings is obviously not mere citation to one another or, for that matter, to case law principles at all. Rather, this Court has consistently invoked the emphatic history that prompted the Framers to separate the legislative from the judicial power. Much of this history was reviewed by this Court in *Plaut*, 514 U.S. at 218-25, and warrants consideration in analyzing the constitutionality of the automatic stay provision.

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Id.* at 219. Seeing themselves as "last courts of equity," colonial legislatures frequently enacted laws setting aside judgments, ordering new trials, granting new privileges of proceeding to one party, and reopening controversies that a court would not reopen so that the legislature's will could be taken into account. *Id.* at 219-22. The exact mechanisms of legislative interference varied, and so did the types of cases in which interference occurred. *See* Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC *1776-1787*, at 154-56, 407-08 & n.24 (1998) (discussing examples of excessive legislative involvement in private controversies, "even in some instances in private cases involving decisions in equity"); Edward S. Corwin, *The Progress of Constitutional History Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514-17 (1925) (noting legislative interference in cases involving fraudulent transactions, defective titles, ugent sales of property "and the like"); *Judicial Action By the Provincial Legislature of Massachusetts*, 15 HARV. L. REV. 208 (1902) (collecting 18th century instances of legislative interference with judgments, including instances in which the legislature granted a party relief in equitable cases already final). The laws sometimes attacked judgments themselves and sometimes operated against the relief called for by those judgments. *See* Corwin, *supra*, at 517 ("Between legislation of this species and outright interferences with the remedial law there was often little to distinguish.").

These practices increased during the years between the American Revolution and the Constitutional Convention as legislatures actively targeted judgments favoring persons disloyal to the Revolution. *Id.* at 514-17; *accord Plaut*, 514 U.S. at 219-20. In response, Madison complained that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST No. 48 (citing Jefferson's complaints about legislative interference with judgments). The Framers were particularly concerned about such legislative interference because it usually impacted the disfavored disproportionately—*i.e.*, it was a threat to the Framers' fundamental motivating concept of individual liberty. *See* THE FEDERALIST Nos. 47, 48, 78

see generally Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991).

Importantly, the Framers recognized that no clear rules could be drawn to prevent improper legislative interference with final judgments. *See* THE FEDERALIST No. 48 ("[The legislature's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with greater facility, mask, under complicated and indirect measures, the encroachments it makes on the coordinate departments. . . . [A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard . . ."); *see also Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality op.) (noting that the separation of powers doctrine requires "delicate accommodations").

In debating the Constitution, the Framers specifically rejected a proposal that the Constitution provide that "the Judicial power . . . be exercised in such manner as the Legislature shall direct," Robert N. Clinton, *A mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 791 (1984), and instead were motivated by a "sharp necessity to separate the legislative from the judicial power," *Plaut*, 514 U.S. at 221. Thus, by vesting the judicial power in the courts and by withholding that power from Congress, the Framers intended to preclude—in a meaningful fashion—legislative interference with final judgments.

This history had led this Court to view Congressional encroachments "with an eye to the[ir] practical effect" and to, where necessary, create "high walls" to ensure that Congress does not seep away judicial authority through aggrandizing exercises of Article I power. *Plaut*,

514 U.S. at 239-40; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986); *see also Northern Pipeline*, 458 U.S. at 83-84 ("[S]ubstantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.").

B. The Constitutional History and *Plaut* Condemn the Automatic Stay Provision

Constitutional condemnation of the automatic stay provision does not depend on a finding that the case falls within the four corners of *Hayburn's Case*, *Klein* or *Plaut*. As explained, those cases merely flow from a separation of powers design that the Framers intended to be broad enough to guard against unwarranted legislative encroachments, "both complicated and indirect" and incapable of comprehensive demarcation. That said, the principles laid down in *Plaut* are themselves broad enough to invalidate the PLRA.

This Court held in *Plaut* that Congress lacks the power to order federal courts to reopen final judgments of Article III courts. In the Court's words, a "legislative instruction to reopen impinges upon the independent constitutional authority of the courts." 514 U.S. 211, 234. While Congress may alter substantive law or enact additional reopening standards, such as those in Civil Rule 60(b), to guide future cases, Congress may not subject judgments that are already final "to a reopening requirement which did not exist when the judgment was pronounced." *Id.*

There are three sub-issues: (1) whether the automatic stay provision serves as a legislative mandate to reopen

final judgments; (2) whether the law operates retroactively within the meaning of *Plaut*; and (3) whether the automatic stay provision is the type of change in law that would render it inequitable not to "stay" judgments when the law applies (*i.e.*, the *Wheeling Bridge* issue).

1. *The Automatic Stay Provision Operates to Reopen Final Judgments*

The separation of powers rule set forth in *Plaut* requires that the judgment at issue be "final." This Court in *Plaut* held that finality for separation of powers purposes is determined by the same rule as finality for other purposes—*i.e.*, whether the judgment is still appealable. 414 U.S. at 227. Under this standard there is no doubt that the *French* decree is final or that the automatic stay provision applies to other final judgments.

The argument has been made, however, that consent decrees imposing prospective relief are never truly "final" for separation of powers purposes because they eventually may be modified or terminated by the court that entered them. Accordingly, the argument is that they are never sufficiently final to come within the *Plaut* rule.

But this Court has already ruled, in a prison conditions case that, notwithstanding changes in the law, "*a consent decree is a final judgment that may be reopened only to the extent equity requires.*" *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 391 (1992) (emphasis added); *see also United States v. Yacoubian*, 24 F.3d 1, 8 (9th Cir. 1994) (stating that a judgment of non-deportation was a final judgment "for separation of powers purposes" once the time for appeal expired); *Stone v. City and Cty. of S.F.*, 968 F.2d 850, 854 (9th Cir. 1992) ("A consent decree is considered a final judgment despite the fact that the district court retains jurisdiction over the case.").

Rufo is dispositive on whether consent decrees are "final" judgments. And *Plaut* itself directly refutes the argument that a consent decree is somehow nonfinal for separation of powers purposes only because it remains subject to equitable modification by the court that entered it. As this Court emphasized, the fact that courts may reopen a final judgment for equitable reasons does not mean that Congress can impose a "legislative mandate-to-reopen" for Congress' reasons. 514 U.S. at 233.

Thus, this Court's precedent provides that consent decrees are "final" judgments even though the district court retains jurisdiction and even though the judgment remains subject to reopening by the district court for equitable reasons.

2. *The Automatic Stay Provision Operates Retroactively*

The argument is made that the stay provision operates only on the prospective relief called for by the judgment and, therefore, does not retroactively impose a new reopening requirement. Not so. Under *Plaut*, the relevant retroactivity issue is whether Congress has subjected a final judgment to a reopening standard that did not exist *when the judgment was pronounced*:

> The relevant retroactivity, of course, consists not of the requirement that there be set aside a judgment that has been rendered *prior to its being set aside*—for example, a statute today which says that all default *judgments rendered in the future* may be reopened within 90 days after their entry. In that sense, all requirements to reopen are "retroactive and the designation is superfluous. . . . The finality that a court can pronounce is no more than what the law in existence *at the time of the judgment* will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain

> reasons, that limitation is built into the judgment itself, and its finality is so conditioned. The present case, however, involves a judgment that Congress *subjected to a reopening requirement which did not exist when the judgment was pronounced.*

Id at 233-34 (some italicized emphasis added); *id.* at 240 ("Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment."); *see also Taylor v. United States*, 181 F.3d 1017, 1024 n.13 (9th Cir. 1999) (en banc) (op. of Rymer, J.) ("Thus, . . . under the PLRA's definition, the congressional directive to terminate [a consent decree] unless it is the minimum necessary to correct a violation goes well beyond the reopening possibilities that the parties could reasonably have expected in 1973. As such, the PLRA definition of 'consent decree' would itself be impermissibly applied retroactively if its effect were to make the *Taylor* judgment anything other than a final judgment 'that may be reopened only to the extent that equity requires' pursuant to Rule 60(b) under *Rufo*.").

The automatic stay provision thus fails because it does not merely set forth reopening standards for "judgments rendered in the future," but instead reopens and suspends relief under judgments already final. Congress cannot do that.

3. Wheeling Bridge *Is Inapplicable*

Before the PLRA, the way to reopen final judgments was through a motion brought under Rule 60(b). *See, e.g., Rufo*, 502 U.S. at 388-91; *Hook v. State of Arizona*, 972 F.2d 1012, 1016-17 (9th Cir. 1992); *see also Plaut*, 514 U.S. at 233-34 (noting that Congress may enact additional reopening standards to supplement Rule 60(b)'s equitable standards for "judgments rendered in the future"). As *Plaut* noted, Rule 60(b) codifies the courts'

"inherent and discretionary power . . . to set aside a judgment whose enforcement would work inequity." 514 U.S. at 233-34. Thus, built into the *French* decree is the reopening standard of Rule 60(b)(5), which posits that a court may relieve a party from a final judgment imposing prospective relief when "it is no longer equitable that the judgment should have prospective application."

In certain instances, courts have modified or terminated relief under injunctions or decrees because, in light of a change in law, it would be inequitable not to modify or terminate the decree. Thus, when a change in law eliminates the need for a decree by eliminating the original basis for the decree, courts have exercised their equitable discretion and modified or terminated the decree. *See, e.g., Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429-30 (1855) (injunction entered because bridge was "inconsistent with and in violation of the Acts of Congress;" court later dissolved injunction because the law had "been modified by competent authority, so that the bridge is no longer an unlawful obstruction"); *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1964) (consent decree entered to enjoin discrimination against non-union workers because the Railway Labor Act prohibited such discrimination; decree later terminated because it would be "inequitable" to enforce it after Congress amended the Act to allow such discrimination). In these cases, changes in the law eliminated the original basis—indeed, the need—for the injunction. Continuing to enforce the decrees, therefore, would have been inequitable.

Thus, if a change in law renders it inequitable to continue enforcing a decree (in whole or in part), then a court should exercise its historical power to alter the decree in a manner designed to cure the inequity. That—and no more than that—is *Wheeling Bridge's* legacy. *See,*

e.g., *Taylor*, 181 F.3d at 1025 (op. of Rymer, J.) ("The important thing about *Wheeling Bridge II* is that it was the *Court* that made this decision, exercising *its* discretion, not Congress that directed the court to reopen and terminate, applying newly enacted standards.") (emphasis in original); Mark Tushnet and Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 62 (1997) (stating that this interpretation of Rule 60(b) "explains the limits of *Wheeling Bridge's* holding"). "In a nutshell, Congress may change the law and, in light of changes in the law or facts, a *court* may decide in its discretion to reopen and set aside a consent decree under Fed. R. Civ. P. 60(b), *see Rufo*, 502 U.S. at 383-84, or refuse to enforce an executory decree pursuant to its inherent power, *see Wheeling Bridge II*, 59 U.S. (18 How.) at 431-32, but *Congress* may not *direct* a court to do so with respect to a final judgment (whether or not based on consent) without running afoul of the separation of powers doctrine. *See Plaut*, 514 U.S. at 227." *Taylor*, 181 F.3d at 1024.

Importantly, however, this Court has emphasized that not all changes in law will justify modifying or terminating relief under a decree; after all, a decree is a "final judgment that may be reopened only to the extent equity requires." *Rufo*, 502 U.S. at 391. The automatic stay provision clearly is not a change in law of the type that would render it inequitable to enforce existing consent decrees.

Common sense makes clear that the automatic stay provision is far different than statutory amendments allowing a bridge over a public waterway (*Wheeling*) or changing the federal laws governing union discrimination (*System*

Federation). In response to those laws, courts terminated or modified injunctions or decrees that had been based on furthering statutory objectives that had been changed. *See, e.g., System Federation*, 364 U.S. at 651 ("[I]t was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us."). When the underlying reason for the injunctions went away due to a change in law, the courts recognized that it would be inappropriate not to modify the relief under the injunction. *See id.* ("The court must be free to continue to serve the objectives of the Act when its provisions are amended.").

By contrast, the PLRA's automatic stay provision is not a change in law that eliminates the need for an otherwise final judgment to be applied prospectively, or that creates an "equitable" reason requiring that the relief be "stayed." The provision neither legalizes conduct that the decree was specifically entered to prevent nor, conversely, illegalizes conduct required by the decree. *See, e.g., Rufo*, 502 U.S. at 388. Indeed, is designed to the law circumvent existing reopening standards by adding a new reopening requirement—a mandate that certain judgments be stayed unless prisoners (and courts) meet newly imposed conditions within a certain time period. Under *Plaut*, while Congress may enact reopening rules for judgments entered in the future, it crosses constitutional boundaries when it orders that the rules be applied to judgments already final. That is precisely the case here.

In sum, pre-PLRA final consent decrees are not subject to all changes in the law, but rather may be affected only to the extent courts conclude that changes in the law render it inequitable to continue enforcing the decree. *See Rufo*, 502 U.S. at 388-91; FED R. CIV. P. 60(b)(5). *Plaut* holds that though *courts* may reopen final judgments

for equitable reasons, that does not mean that Congress may itself suspend or order courts to reopen final judgments for *Congress'* reasons. The automatic stay provision is an improper reopening requirement that did not exist when the *French* decree became final, does not operate to render enforcement of the decree inequitable and, therefore, is unconstitutional.

C. The Automatic Stay Provision Imposes Undue Burdens on Prisoners' Judgment Rights

The automatic stay provision is something of a cruel joke. The provision relieves prisons of their duties under judgments unless, within thirty or, in some cases, ninety days, the prisoners manage to demonstrate and the district court specifically finds that the relief required by the judgment is necessary to correct an ongoing violation of a federal right, extends no further than necessary to correct the violation and the relief is narrowly drawn and the least intrusive means available to correct the ongoing violation. 18 U.S.C. §§ 3626(b)(3), 3626(e). But virtually no parties can honestly meet these standards, even within the longer ninety-day period.

First, almost by definition, most existing consent decrees were largely the product of settlement and were entered before any finding of unconstitutional conduct. In virtually all such decrees the relief was negotiated and there was no reason for it to have been the "least intrusive" available to correct the alleged constitutional or other violation. The likelihood that relief stipulated to years ago happens today to be the least intrusive means available to remedy an ongoing violation is basically nil. Properly understood, the PLRA simply provides that prisoners' judgment rights will be suspended unless the prisoners can relitigate and prevail within ninety days on issues they resolved via settlement years ago.

Second, even assuming a good record from years ago, prisoners still almost certainly cannot win. Absent some judicial fudging in applying the PLRA's standards or the existence of a very recent record, there is no chance for prisoners to overcome the practical hurdles.

For example, there is no guarantee that the prisoners will be represented by counsel when a motion to terminate is filed. That was the case in *Taylor*: a judgment had been entered in 1973; class counsel had withdrawn in 1980; and the State of Arizona had honored the judgment without further proceedings into the 1990s. When the motion to terminate was filed, the district court had to appoint counsel. Naturally, reasonable delay occurred in locating counsel, and appointed counsel was in no position to put together a case almost from scratch to meet the PLRA's standards.

Even assuming the prisoners are represented from the outset by counsel, and even assuming that the judgment was issued in recent years, the outcome usually will be no different. Consent decrees often provide wide-ranging relief, frequently involving multiple prisons, jails or housing units. To prepare a case about the current rules, conditions, practices or other aspects at these multiple sources requires (1) particular clients [the class representatives years ago may not even be incarcerated today]; (2) meaningful access to those clients; (3) discovery from government officers or employees, though which ones may not be apparent; (4) evidence of unconstitutional conduct or practices beyond mere allegations or anecdotal proof; (5) analysis of whether the institutions are following their own rules and regulations; (6) legal research; (7) preparing for an evidentiary hearing; (8) briefing; (9) arranging for testimony from both government and incarcerated witnesses; and (10) a hearing. And, again, all this must add up to establishing that the relief imposed or agreed

upon in the past happens to be the least intrusive means anyway. No matter how intense the effort, this simply almost never will happen within thirty or even ninety days.

It also bears mentioning that expert assistance often is necessary in large institutional reform litigation; that counsel often will be working *pro bono*; that inmates' ability to actively assist their counsel and participate in advocacy is severely limited; that the relevant proof is almost fully within the custody and control of the defendants; and that the prisons often are located in outlying or rural areas. These factors further impair prisoners' rights to defend their judgment rights.

In most circumstances, prisoners will be better off simply forfeiting their existing judgment rights and starting over. At least then they will not be rushed into a hearing prematurely or forced to try to shape existing evidence to back up findings or relief provided on a totally different record many years earlier.

These practical blockades cannot easily be removed by even the most diligent, knowledgeable and skilled district court judges. Under the circumstances, counsel cannot reasonably be expected to put together the kind of proof necessary to meet the PLRA's standards within ninety days. The law's purpose is perfectly transparent: to terminate past judgments favoring prisoners. Although politically popular—as were the laws condemned by the Framers and by this Court in *Klein* and *Plaut*—the tactic is unconstitutional.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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